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No. 05-____

IN THE
SUPREME COURT OF THE UNITED STATES

HENRY TORROMEO and MDR CORPORATION,
Petitioners,

v.

TOWN OF FREMONT, NEW HAMPSHIRE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Timothy S. Hollister
(Counsel of Record)
Allison M. McKeen
Shipman & Goodwin LLP
One Constitution Plaza
Hartford, CT 06103-1919
(860) 251-5000

Sumner F. Kalman
Thea Valvanis
147 Main Street
P. O. Box 988
Plaistow, NH 03865
(603) 382-4003

Duane J. Desiderio
Thomas J. Ward
Felicia Watson
National Association of
Home Builders
1201 15th Street, NW
Washington, DC 20005
(202) 266-8200

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QUESTIONS PRESENTED

In *San Remo Hotel, L.P. v. City and County of San Francisco,* 545 U.S. 323 (2005), four concurring Justices stated this Court's decision in *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City,* 473 U.S. 172 (1985), "may have been mistaken," because "[i]t is not clear ... that *Williamson County* was correct in demanding that ... the claimant must seek compensation in state court before bringing a federal takings claim in federal court." *San Remo*, 545 U.S. at 340.

1. **Must a takings claimant first seek and be denied compensation in state court, before bringing a federal takings claim in federal court?**

In *Lingle v. Chevron U.S.A., Inc.,* 544 U.S. 528 (2005), this Court held that the "failure to substantially advance a legitimate government interest" formula from *Agins v. City of Tiburon,* 447 U.S. 255 (1980), "has no proper place in our takings jurisprudence" because it "prescribes an inquiry in the nature of a due process ... test ...." *Lingle,* 544 U.S. at 540. The lower federal courts are widely split over the standard of liability for a deprivation of property without due process.

2. **What is the proper standard of liability for a deprivation of property without due process?**

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The Petitioners are Henry Torromeo, a sole proprietor, and MDR Corporation, a small family-owned business incorporated in the State of New Hampshire and run by brothers Mark and Daniel Post and their father Russell Post. Torromeo and MDR are in the business of developing and building single-family home sites. MDR has no parent or subsidiary corporation, and no public company owns more than ten percent of its stock.

The Respondent is the Town of Fremont, a municipal corporation in the southeast corner of New Hampshire.

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PETITION FOR A WRIT OF CERTIORARI

Henry Torromeo and MDR Corporation ("Petitioners") respectfully petition this Court for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, App. 1a, is reported at 438 F.3d 113 (1st Cir. 2006). The opinion of the district court, App. 15a, is unpublished.

JURISDICTION

The court of appeals issued its decision on February 21, 2006, and denied rehearing on April 11, 2006. App. 14a. Justice Souter extended the time to file this petition to and including July 21, 2006. App. 12a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment's Due Process and Takings Clauses provide: "No person shall ... be deprived of ... property without due process of law; nor shall private property be taken for public use without just compensation." U.S. Const. amend. V. They are applicable to the States through the Fourteenth Amendment, which provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

The law regarding ripeness under the Fifth Amendment Takings Clause is conflicting and confusing. This petition seeks clarification of the procedures that a plaintiff must pursue so that a federal court can resolve the merits of a federal takings claim.

Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 195 (1985), held that a Fifth Amendment takings claim is not ripe for adjudication "until" the claimant has pursued available

"state procedures" and has been denied compensation. Lower federal and state courts have interpreted this holding to mean that a federal takings claim does not exist until state litigation has been exhausted. Last term, in *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 342 (2005), four concurring Justices agreed that *Williamson*'s "state-litigation rule" has "created some real anomalies, justifying our revisiting the issue." The concurrence stated "our decision in *Williamson* ... may have been mistaken," because "[it] is not clear ... that *Williamson* ... was correct in demanding that ... [a takings] claimant must seek compensation in state court before bringing a federal takings claim in federal court." *Id.* at 340.

This petition squarely presents the opportunity to "revisit" the "real anomalies" created by *Williamson*. The lower federal and state courts have thoroughly considered and addressed the state-litigation rule. Postponing review will not contribute to resolution of the questions presented. More turmoil on the procedures to ripen Fifth Amendment takings claims will spread unless this Court intervenes.

A. Fremont Denies Petitioners' Rights to Build.

Petitioners are typical of takings claimants who have been trapped by *Williamson*'s jurisdictional requirements. Their litigation odyssey exceeds six years at this point, and they have yet to receive a decision on the merits of their federal takings claims from *any* court.

In early 1999, Petitioner Henry "Red" Torromeo owned five lots in a 27-lot, partially-built residential subdivision in Fremont, New Hampshire. Torromeo had rights, conferred by state statute, to a building permit for each of his five vacant lots. Also in early 1999, Petitioner MDR Corporation, a small, family-run home building business, had a plan to develop 14 lots in a different subdivision on land zoned to allow that use.

In March 1999, Fremont adopted an ordinance establishing an annual cap on the number of building

permits it would issue. In April 1999, the town's planning board set a limit of 26 permits to be issued during the next 12 months.

MDR requested 14 building permits in May 1999. Applying the cap, the town issued five, denied the rest, and informed MDR it would have to wait until at least April 2000 to receive any more permits. MDR then sued in state court to compel permit issuance. In September 1999, Torromeo requested building permits for his five lots, but the town denied them all because the annual quota had been reached. Torromeo then brought his own state lawsuit to compel permit issuance.

In December 1999, in MDR's case, a state trial court declared the building cap ordinance "invalid *ab initio*" because the town failed to comply with the statutory requirements to adopt such an ordinance. App. 94a. The court thus ordered Fremont to issue MDR's remaining permits. Fremont was also ordered to issue Torromeo's permits because a state statute gave him the right to build, as the subdivision in which his lots were located pre-dated the ordinance's enactment. App. 88a. The town only appealed the MDR decision, and the New Hampshire Supreme Court affirmed that the ordinance was invalid. App. 74a.

B. Petitioners' State Actions Seeking Compensation.

By enforcing the invalid ordinance and denying building permits, the town froze substantial investments that MDR and Torromeo made in their properties. Thus, in separate suits, Petitioners brought state law claims against Fremont for inverse condemnation without just compensation.[1] App. 75a, 79a. Adhering to First Circuit

[1] Inverse condemnation occurs when the "government [defendant] takes the land at issue without initiating condemnation proceedings," such as by regulation or physical occupation. *City of*

and New Hampshire precedent interpreting *Williamson* to mean that a federal takings claim does not exist until compensation is denied under state law, Petitioners sued in state court under the New Hampshire Constitution's takings provision. App. 95a. See *Gilbert v. City of Cambridge*, 932 F.2d 51, 64 (1st Cir.), *cert. denied*, 502 U.S. 866 (1991); *Blue Jay Realty Trust v. City of Franklin*, 567 A.2d 188 (N.H. 1989) (both holding that a Fifth Amendment claim is not ripe until a state claim has been denied). To support their state compensation claims, MDR's and Torromeo's complaints each referred once to the federal Takings Clause. They also cited one federal decision, *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315-316 (1987) (holding that the Fifth Amendment's "self-executing" remedy for a taking is the payment of just compensation, not simply invalidation of the underlying government action). App. 77a-78a; 81a-82a.

The cases were consolidated. In March 2001, a state trial court ruled, solely on state law grounds, that Fremont's conduct was "unconscionable" and that Petitioners were "entitled as a matter of law to recover damages for economic loss due to Fremont's attempted enforcement of its invalid Growth Control Ordinance." App. 72a. The court subsequently awarded $71,600 to MDR and $23,800 to Torromeo. App. 67a.

Fremont appealed, *identifying only state law as the basis*. App. 50a-57a. The New Hampshire Supreme Court reversed. App. 43a-49a. It held that Fremont's denial of the building permits was "an erroneous planning board decision based upon an otherwise valid regulation" (App. 47a), and that just compensation for a taking is due only when a court "determin[es] that the ordinance is unconstitutional." App. 48a. New Hampshire law

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Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 712 (1999).

provided the sole basis for the state supreme court's decision. It did not reference a single federal case. Nor did it address whether its analysis satisfied Fifth Amendment standards.

Petitioners sought a writ of certiorari from this Court, docketed as No. 02-1507. That petition challenged the New Hampshire Supreme Court's decision as contradicting federal takings standards, including those established by *First English*. In opposition, Fremont argued that Petitioners had waived any federal takings claim by failing to plead or argue the Fifth Amendment in the state inverse condemnation action. App. 42a. This Court declined review, 539 U.S. 923 (2003).

C. District Court Dismisses Federal Claims.

Having satisfied *Williamson*'s requirement to ripen their federal takings claims by first seeking and being denied compensation in the New Hampshire courts, Petitioners brought this action in U.S. district court in August 2003. App. 29a. Their federal complaint, filed under 42 U.S.C. § 1983, sought compensation under the Fifth Amendment Takings Clause. App. 36a-37a. Petitioners also alleged that Fremont's actions deprived them due process and equal protection under the Fifth and Fourteenth Amendments. App. 37a-38a. Fremont moved to dismiss, asserting the *Rooker-Feldman* doctrine and claim preclusion. It did not assert issue preclusion.[2] The district court held that claim preclusion and *Rooker-Feldman* barred all claims. App. 15a.

[2] Claim preclusion, or res judicata, bars re-litigation of claims in a subsequent suit that were or could have been raised in a prior action. Issue preclusion, or collateral estoppel, prevents subsequent re-litigation of identical issues of fact or law that were actually decided by and essential to a prior judgment. *San Remo*, 545 U.S. at 332 n.16 (comparing the two doctrines).

D. Court of Appeals Affirms.

While this appeal was pending, the Court decided *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005), which the court of appeals thought "substantially limited the reach" of Fremont's *Rooker-Feldman* defense. App. 4a. The issue on appeal thus narrowed to whether claim preclusion barred Petitioners' federal claims.

Petitioners argued that, under First Circuit and New Hampshire interpretations of *Williamson,* their federal takings claims did not ripen and did not exist until after the New Hampshire courts denied compensation. Thus, claim preclusion could not bar Petitioners' federal takings claims because they were not cognizable until the state court proceedings were exhausted. Petitioners further argued that even if they tried to assert Fifth Amendment takings claims in the state action, any federal claims would not have been decided because New Hampshire courts employ a "primacy approach" to constitutional cases. Using this approach, New Hampshire courts do not reach federal constitutional claims unless they determine that federal law provides greater protection than state law. See, *e.g.*, *State v. Ball*, 471 A.2d 347 (N.H. 1983). Because New Hampshire regards the state and federal takings clauses as equivalent, its courts decide takings claims on state constitutional grounds only. See, *e.g.*, *Sanderson v. Town of Candia*, 787 A.2d 167 (N.H. 2001); *Burrows v. City of Keene*, 432 A.2d 15 (N.H. 1981).

Nonetheless, the court of appeals found that claim preclusion barred federal adjudication of Petitioners' federal takings claims. It thought that "this case appears to fall squarely within New Hampshire's res judicata rules." App. 5a. It thus invoked claim preclusion because Petitioners' state complaints "identified the Takings Clause of the Fifth Amendment" and "cited *First English* ..., a Supreme Court case interpreting the Takings Clause." App. 7a. It further reasoned that because New Hampshire regards the state and federal takings clauses as equivalent, "the [state] court's decision that the Town did not violate

the [state] takings provision ... means, *a fortiori,* that, in its view, there was no unlawful taking under federal law." App. 8a, n. 3.

As to Petitioners' due process and equal protection claims, the court of appeals bypassed ripeness and claim preclusion and disposed of them on the merits. It held that "substantive due process prevents governmental power from being used for purposes of oppression, or abuse of government power that shocks the conscience, or action that is legally irrational in that it is not sufficiently keyed to any legitimate state interest." App. 9a-10a. The court held that the town's enforcement of the invalid ordinance and withholding of Petitioners' permits, to which they were entitled under state law, did not meet this standard. The court of appeals thus ignored the state trial court's finding that Fremont's conduct was "unconscionable." App. 72a. As to equal protection, the court framed the standard as "extreme circumstances" or "fundamental discrimination," and concluded the facts did not rise to that level. App. 11a. It later denied rehearing. App. 14a.

REASONS FOR GRANTING THE WRIT

I. *WILLIAMSON*'S STATE-LITIGATION RULE HAS GENERATED CONFLICTS AND CONFUSION, AND SHOULD BE RECONSIDERED.

A. The State-Litigation Rule and the *"Williamson* Trap."

Williamson devised two rules to ripen Fifth Amendment takings claims. First, such claims are not ripe until government "has reached a final decision regarding application of the regulations to the property ..." 473 U.S. at 186. This finality rule is not at issue here.

Williamson's second ripeness requirement is at issue: "[If] a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and has been denied just compensation." *Id.* at 195. Concurring in *San Remo,* the late Chief Justice

Rehnquist labeled this requirement the "state-litigation rule," and described it as follows: "Until the claimant had received a final decision of compensation through all available state procedures, such as by an inverse condemnation action, ... he 'could not claim a violation of the Just Compensation Clause.'" 545 U.S. at 341 (citing *Williamson,* 473 U.S. at 195-196). The concurrence further observed that the state-litigation rule "may have been mistaken." *Id.* at 340.

Most federal circuits (including the First Circuit) have interpreted *Williamson* to mean that a Fifth Amendment takings claim is not ripe—it does not exist—until a property owner has litigated its case in state court, under state law, and has been denied compensation.[3] In addition, several state courts (including New Hampshire's) have held that a federal takings claim may *not* be joined with a state takings claim. See, *e.g.*, *Melillo v. City of New Haven*, 732 A.2d. 133 (Conn. 1999); *Breneric Assocs. v. City of Del Mar,* 69 Cal. App. 4th 166, 81 Cal. Rptr. 2d 324 (1998); *Blue Jay Realty Trust v. City of Franklin,* 567 A.2d 188 (N.H. 1989). However, after takings claimants pursue initial state litigation as *Williamson* requires, federal courts still avoid the merits of Fifth Amendment claims by

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[3] *Gilbert v. City of Cambridge,* 932 F.2d 51, 63-65 (1st Cir.), *cert. denied,* 502 U.S. 866 (1991); *Southview Assocs., Ltd. v. Bongartz*, 980 F.2d 84, 99-100 (2d Cir. 1992), *cert. denied*, 507 U.S. 987 (1993); *County Concrete Corp. v. Twp. of Roxbury*, 442 F.3d 159, 168 (3rd Cir. 2006); *Samaad v. City of Dallas,* 940 F.2d 925, 933-36 (5th Cir. 1991); *Peters v. Fair*, 427 F.3d 1035, 1038 (6th Cir. 2005); *Forseth v. Vill. of Sussex*, 199 F.3d 363, 368-73 (7th Cir. 2000); *Von Kerssenbrock-Praschma v. Saunders*, 121 F.3d 373, 379-80 (8th Cir. 1997); *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401, 405-07 (9th Cir. 1996), *cert. denied,* 523 U.S. 1059 (1998); *Bateman v. City of West Bountiful*, 89 F.3d 704, 708-709 (10th Cir. 1996); *Agripost, Inc. v. Miami-Dade County*, 195 F.3d 1225, 1234 (11th Cir. 1999), *cert. denied*, 531 U.S. 815 (2000).

dismissing them on claim preclusion, issue preclusion, *Rooker-Feldman*, abstention, or a combination of these grounds. See generally Michael Berger & Gideon Kanner, *Shell Game! You Can't get There From Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage*, 36 Urb. Law. 671 (2004).

Thus, it has become the regular practice of the lower courts to bar federal takings claims brought before state court litigation as *too early*, and federal claims brought after state litigation as *too late*. This problem is called the "*Williamson* Trap,"[4] and it has ensnared Torromeo and MDR. Under *Williamson*, First Circuit precedent, and the weight of numerous other cases, Petitioners did not have ripe federal takings claims when they filed their state court actions for compensation. And, under New Hampshire case law, they were unable to raise Fifth Amendment claims in the state action. *Blue Jay Realty*, 567 A.2d at 192. Yet, after Petitioners exhausted litigation in the state courts to ripen their federal claims, the court of appeals below invoked claim preclusion to bar federal adjudication. In other words, the New Hampshire litigation, "far from 'ripening' the federal cause of action, ... has instead extinguished it .... Thus, ... the very act of 'ripening' [Petitioners' federal] case also end[ed] it."[5]

B. *San Remo*.

The *Williamson* Trap laid the foundation for *San Remo*. The state-litigation rule's validity was not directly challenged in *San Remo*, as it is in this petition. Rather, the question there was whether the rule's application warranted an exemption. The Court was asked to decide "whether

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[4] Madeline J. Meacham, *The Williamson Trap*, 32 Urb. Law. 239 (2000).

[5] See Robert H. Freilich & Jason M. Divelbiss, *The Public Interest is Vindicated: City of Monterey v. Del Monte Dunes*, 31 Urb. Law. 371, 387 (1999).

federal courts may craft an exception to the full faith and credit statute for claims brought under the Takings Clause of the Fifth Amendment." 545 U.S. at 326.[6] *San Remo* also addressed whether a claimant could avoid issue preclusion by reserving a federal claim in state court under the authority of *England v. La. State Bd. of Med. Exam'rs*, 375 U.S. 411 (1964). *San Remo*, 545 U.S. at 333-34.

This Court held it was "not free to disregard the full faith and credit statute solely to preserve the availability of a federal forum" after initial state litigation mandated by *Williamson*. *San Remo*, 545 U.S. at 339. The Court further recognized that issue preclusion bars relitigation in federal court after a "state court actually decided an issue of fact or law that was necessary to its judgment." *Id.* at 336. "This is so even when the plaintiff would have preferred not to litigate [first] in state court, but was required to do so by statute or prudential rules." *Id.* Moreover, the Court ruled that reserving a federal claim for later federal court review was not permissible, resolving a circuit split on this point. *Id.* at 333-34.[7]

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[6] In *San Remo*, the plaintiffs challenged a monetary exaction to mitigate a claimed impact on San Francisco's affordable housing stock resulting from the conversion of a residential building to a tourist hotel. The California courts, adjudicating a state law claim only, with plaintiff's federal claim expressly reserved, considered whether the exaction was a taking without compensation, and held it was not. *San Remo Hotel, L.P. v. City and County of San Francisco*, 41 P.3d 87 (Cal. 2002). The hotel owners then proceeded to federal court. The Ninth Circuit estopped the federal action under issue preclusion, finding that the state court actually and necessarily decided the principal issues comprising the federal claim. *San Remo Hotel, L.P. v. San Francisco City and County*, 364 F.3d 1088 (9th Cir. 2004), *aff'd*, 545 U.S. 323 (2005).

[7] Yet, the Eleventh Circuit, without mentioning *San Remo*, recently held that a federal claim may still be reserved. *Bauknight v. Monroe County*, 446 F.3d 1327, 1330-31 (11th Cir. 2006).

San Remo disrupted the entrenched interpretation of *Williamson* (see *supra* note 3), that a federal takings claim is not ripe until state proceedings have terminated. Holding that state courts *may* exercise jurisdiction over state *and* federal claims in the mandated state action, *San Remo* explained:

> The requirement that aggrieved property owners must seek "compensation through the procedures the State has provided for doing so" ... does not preclude state courts from hearing *simultaneously* a plaintiff's request for compensation under state law and the claim that, in the alternative, the denial of compensation would violate the Fifth Amendment of the Federal Constitution.

Id. at 338 (citing *Williamson,* 473 U.S. at 194) (emphasis supplied).

San Remo's relinquishment of federal jurisdiction over Fifth Amendment claims prompted four concurring Justices to question the state-litigation rule. It was not clear to them that *Williamson* "was correct in demanding that once a government entity has reached a final decision with respect to a claimant's property, the claimant must seek compensation in state court before bringing a federal takings claim in federal court." *San Remo,* 545 U.S. at 340 (Rehnquist, C.J., concurring). The concurrence doubted that "either constitutional or prudential principles require claimants to utilize all state compensation procedures before they can bring a federal takings claim." *Id.* at 340-41. The concurrence further acknowledged that the "state-litigation rule has created some real anomalies, justifying our revisiting the issue." *Id.* at 342.[8] These anomalies

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[8] Several lower courts would agree. See, *e.g.*, *Kottschade v. City of Rochester,* 319 F.3d 1038, 1041 (8th Cir.) (state-litigation rule has created an "anomalous ... gap in Supreme Court jurisprudence"), *cert. denied,* 540 U.S. 825 (2003); *Wilkinson v. Pitkin County Bd. of Comm'rs,* 142 F.3d 1319, 1325 n.4 (10th Cir.

include contradictions within this Court's own body of takings law, and conflicts between the circuit courts of appeals.

C. This Court's Decisions Conflict.

1. *Williamson* and *San Remo*. Tension is especially pronounced between *Williamson* and *San Remo*. The *Williamson* Court made clear that exhaustion of state compensation procedures is a necessary first step to ripen federal takings claims: "*until* [a plaintiff] has utilized [state] procedure[s], its takings claim is *premature*." *Williamson*, 473 U.S. at 197. (emphasis supplied).[9] Numerous lower federal courts have interpreted *Williamson* to mean that a federal takings claim becomes justiciable only after state litigation is over and compensation is denied to the plaintiff. *Supra* note 3. Scholars also read *Williamson* as allowing federal adjudication after a state court denies compensation.[10]

The full Court's opinion in *San Remo*, however, upended this widespread understanding. It declared that

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1998) ("It is difficult to reconcile the [state litigation] ripeness requirement of *Williamson*" with issue and claim preclusion).

[9] See *also Williamson*, 473 U.S. at 194 ("A second reason the takings claim is *not yet ripe* is that respondent did not seek compensation through the procedures the state has provided for doing so"); *id.* at 195 ("the property owner cannot claim a violation of the Just Compensation Clause *until it has used* the [available State] procedure and been denied just compensation").

[10] See, *e.g.*, Steven J. Eagle, Regulatory Takings 1062 (2d ed. 2001) ("The 'ripeness' metaphor is one that promises ultimate vindication"); Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. Land Use & Envtl. L. 37, 67 (1995) ("the language ... suggests that the state law is merely preparatory to a federal suit"); Madeline J. Meacham, *The Williamson Trap*, 32 Urb. Law. 239, 249 (2000) ("language ... of *Williamson* suggests that a federal claim will survive after disposition in the state court").

takings plaintiffs could "simultaneously" request compensation in state court under both state and federal law, and that Fifth Amendment claims could be brought during a state suit. *San Remo,* 545 U.S. at 338. Thus, while *Williamson* ruled that a federal takings claim is not ripe until *after* the state denies compensation, *San Remo* ruled that federal claims can be brought *simultaneously* with state claims in state court.

So, which is the rule? How can a Fifth Amendment claim be brought simultaneously with a state claim in state court, when that federal claim is not ripe until after the state court denies compensation? Must the federal and state takings claims be raised in the same, or separate, state suits? Should those claims be tried in state court sequentially? If sequential, do claim and issue preclusion apply to the federal claim if compensation is denied under state law? What effect does *San Remo*'s simultaneous claim rule have on case law from the lower federal courts, *supra* note 3, which have been virtually unanimous that, under *Williamson,* they lack federal takings jurisdiction until state litigation concludes? This question is critical to Petitioners because, when they filed their state suit, First Circuit precedent deemed their federal takings claim unripe. See *Gilbert v. City of Cambridge,* 932 F.2d 51, 63-65 (1st Cir.), *cert. denied*, 502 U.S. 866 (1991). Did *San Remo*'s allowance of "simultaneous claims" overrule cases like *Gilbert*?

And what happens to state court decisions like *Blue Jay Realty,* 567 A.2d 188, which refuse to entertain federal takings claims until compensation is finally denied under state law? How could Petitioners ever bring Fifth Amendment claims in the New Hampshire system, where takings litigation is resolved "solely on the basis" of the state's constitution? See *Burrows v. Keene,* 432 A.2d 15 (N.H. 1981). As the *San Remo* concurrence acknowledged:

> [I]n some states the courts themselves apply the state litigation requirement from *Williamson* ... refusing to entertain any federal takings claim until the claimant receives a final denial of compensation through all

> available state procedures ... [Citations omitted.] This precludes litigants from asserting their federal claim even in state court.

San Remo, 545 U.S. at 342, n.2 (Rehnquist, C.J., concurring).

If federal takings claims are to be decided exclusively by state courts, with no further access to federal court, then this Court should clearly state that is the case. If the predominant interpretation of *Williamson*—that a federal claim is not ripe until compensation has been denied in state litigation—has been overruled, claimants and courts require this clarification. If issue and claim preclusion bar litigation of a federal claim in state court *and* access to federal court after state proceedings, this Court should so declare. Respectfully, this petition should be granted so the Court can clarify the contradictions between *Williamson* and *San Remo*.

2. Removal Jurisdiction. *Williamson's* state-litigation rule also cannot be reconciled with *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156 (1997). There, a plaintiff brought both federal and state takings claims in state court. The city then removed the case to federal court. This Court, without discussing *Williamson*, allowed the removal to stand because "a case containing claims that local administrative action violates federal law ... is within the jurisdiction of the federal district courts." *Id.* at 163. Under the federal removal statute, a case can be removed from state to federal court only if it could have been brought in federal court *originally*. 28 U.S.C. §1441(a).

Under *Williamson*, federal courts do *not* have original jurisdiction over federal takings claims because they are not ripe until the property owner brings state litigation and loses. *San Remo* confirms there is no original federal jurisdiction over federal takings claims, and counsels that they may be brought simultaneously with state claims in state court. Yet under *City of Chicago*, federal courts *do* have original jurisdiction over federal takings claims because a municipality may remove them to federal court. The upshot is that the lower federal courts decide federal

takings claims only when municipal defendants exercise their removal option. The petition should be granted to address the dilemma created by *Williamson, San Remo,* and *City of Chicago,* as to whether federal courts do, in fact, possess "original jurisdiction" over Fifth Amendment takings claims.

3. Seventh Amendment Rights to Jury Trials. *Williamson's* state-litigation rule also undermines *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999). There, this Court held that takings plaintiffs in section 1983 litigation, like Petitioners here, have a Seventh Amendment right to a jury trial on issues of government liability. In stark contrast, state courts generally do not submit regulatory takings liability issues to juries. *Id.* at 719. Indeed, Petitioners never received a jury trial on Fremont's Fifth Amendment liability in the New Hampshire courts. If *Williamson* and *San Remo* truly compel litigation of federal takings claims in state court, then the Seventh Amendment rights confirmed by *Del Monte Dunes* are illusory in states that do not provide jury trials on takings liability.

Unlike the Fifth Amendment, which was the first guarantee in the Bill of Rights applied to the states through the Fourteenth Amendment, see *Chicago, B. & Q. R. Co. v. City of Chicago,* 166 U.S. 226 (1897), "[i]t is settled law that the Seventh Amendment does not apply" to "suits decided by state court." *Del Monte Dunes,* 526 U.S. at 719. This Court's attention is needed to ensure that the state-litigation rule does not abrogate Seventh Amendment rights to jury trials in takings cases.

D. The Circuit Courts of Appeals Conflict.

1. Conflict on Claim Preclusion. In this case, the court of appeals invoked claim preclusion to dismiss Petitioners' takings claims. It thus widened a multi-circuit split, which developed prior to *San Remo*, on whether claim preclusion applies in a subsequent federal takings suit that follows a *Williamson*-mandated state action. Here, the First Circuit joined the Third, Sixth, and Tenth Circuits in allowing

claim preclusion to bar subsequent federal takings claims following mandatory state proceedings.[11] The Second and Ninth Circuits, and the Sixth Circuit in a later case, have disagreed. They have held that compulsory resort to state court under *Williamson* does not extinguish Fifth Amendment claims subsequently filed in federal court.[12] As the Sixth Circuit observed in rejecting a claim preclusion defense: "[The] interaction of *Williamson County*'s ripeness requirements and the doctrine of claim preclusion could possibly operate to keep every regulatory takings claimant out of federal court." *DLX, Inc. v. Kentucky*, 381 F.3d 511, 521 (6th Cir. 2004).

Significantly, the Ninth Circuit has distinguished between issue and claim preclusion in the context of the state-litigation rule. In *San Remo,* the Ninth Circuit invoked *issue* preclusion to bar relitigation in subsequent federal proceedings. 364 F.3d 1088, 1096 (9th Cir. 2004), *aff'd* 545 U.S. 323 (2005). But in *Dodd,* the Ninth Circuit refused to apply *claim* preclusion:

> [To] hold that a takings plaintiff must first present a Fifth Amendment claim to the state court system ... would be to deny a federal forum to every takings claimant. We are satisfied that *Williamson County* may not be interpreted to command such a revolutionary concept and draconian result.

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[11] See *Peduto v. City of N. Wildwood*, 878 F.2d 725 (3d Cir. 1989); *Wilkinson v. Pitkin County Bd. of County Comm'rs*, 142 F.3d 1319 (10th Cir. 1998); *Rainey Bros. Constr. Co., Inc. v. Memphis & Shelby County Bd. of Adjustment*, 967 F. Supp. 998 (W.D. Tenn.), *aff'd*, 178 F.3d 1295 (6th Cir. 1999).

[12] See *Santini v. Conn. Hazardous Waste Mgmt. Serv.*, 342 F.3d 118 (2d Cir. 2003), overruled as to issue preclusion and claim reservation by *San Remo*, 545 U.S. at 336; *DLX, Inc. v. Kentucky*, 381 F.3d 511 (2004); *Dodd v. Hood River County*, 59 F.3d 852 (9th Cir. 1995).

59 F.3d at 869-70. The circuits thus disagree on the application of claim preclusion following *Williamson* state proceedings, and this Court should intervene.

2. Conflict on Removed Cases. As discussed *supra* 14-15, *City of Chicago* allows a municipal defendant to remove a takings case to federal court after a plaintiff's initial state filing. However, the lower courts are split on whether they have jurisdiction to decide Fifth Amendment takings claims that have been so removed. The Seventh Circuit, on remand in *City of Chicago,* decided it could resolve a removed federal takings claim on the merits, despite the lack of prior state litigation. *Int'l Coll. of Surgeons v. City of Chicago,* 153 F.3d 356, 360 (7th Cir. 1998). In contrast, the Eighth Circuit recently held it lacked jurisdiction precisely because no original state proceeding had ripened the federal claim. The stunning aspect of this decision is that the federal court dismissed for lack of jurisdiction, even though the plaintiff filed initially in state court and was forced into federal court by the city's removal motion. *Koscielski v. City of Minneapolis,* 435 F.3d 898, 903-904 (8th Cir. 2006). The Fifth Circuit has similarly whipsawed a takings plaintiff who filed suit originally in state court, only to see a municipal defendant remove the matter to federal court—and then argue for dismissal because *Williamson's* state-litigation rule went unsatisfied. The Fifth Circuit rewarded the city for its chutzpah by dismissing the case. See *Sandy Creek Investors, Ltd. v. City of Jonestown,* 325 F.3d 623, 626 (5th Cir. 2003).

"[C]onsiderations of fairness and justice" are at the heart of the Takings Clause. *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency,* 535 U.S. 302, 333 (2002). It is not fair or just to allow a municipal defendant to remove a takings case to federal court, and then seek and receive a dismissal for lack of a prior state ripening suit. The circuits are split on how to handle removed takings cases. The Court could resolve this conflict by addressing the state-litigation rule as presented in this petition.

3. Conflict on Application of State-Litigation Rule to Other Constitutional Claims. The lower federal courts also clash on whether the state-litigation rule extends beyond takings claims to reach due process and equal protection claims. In many constitutional property rights cases, plaintiffs assert some combination of takings, due process, and equal protection violations under 42 U.S.C. § 1983. Indeed, Petitioners here asserted all three claims against Fremont. Some circuits restrict *Williamson*'s state remedies requirement to takings claims only.[13] However, the Seventh Circuit, in parsing a landowner's section 1983 claims, held that *Williamson*'s state-litigation rule applies to takings and due process, but not equal protection. *Forseth v. Vill. of Sussex*, 199 F.3d 363, 370-71 (7th Cir. 2000). The First Circuit has held that state claims must be exhausted to ripen federal takings and due process claims, without opining on equal protection. *Deniz v. Mun. of Guaynabo*, 285 F.3d 142, 149 (1st Cir. 2002). The Second and Tenth Circuit extended *Williamson* to its outer limits, requiring ripening state litigation for all three types of claims. *Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 88 (2d Cir. 2002); *Bateman v. City of West Bountiful*, 89 F.3d 704, 709 (10th Cir. 1996).

This issue is particularly important because of *San Remo*'s authorization of simultaneous state and federal takings claims in state court. Do *Williamson* and *San Remo*

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[13] See, *e.g.*, *County Concrete Corp. v. Twp. of Roxbury*, 442 F.3d 159, 169 (3d Cir. 2006) ("[G]iven that the 'exhaustion of just compensation procedures' requirement only exists due to the 'special nature of the Just Compensation Clause,' it is inapplicable to appellant's facial [substantive due process] and [equal protection] claims"). Accord *Sinaloa Lake Owners Ass'n. v. City of Simi Valley*, 882 F.2d 1398, 1404 (9th Cir. 1989); *Front Royal and Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 283 n.3 (4th Cir. 1998); *McKenzie v. City of White Hall*, 112 F.3d 313, 317 (8th Cir. 1997).

apply also to due process and equal protection? This Court should grant this petition to resolve this question.

E. This Appeal Turns on the State-Litigation Rule, not Claim Preclusion.

The decision below is a classic example of how lower courts spring the *Williamson* Trap on takings claimants. Petitioners first brought their state inverse condemnation claims in state court. Thus, they obeyed *Williamson* and the First Circuit's repeated holding that federal takings claims do not exist until a state court has denied state law compensation claims. See, *e.g., Pascoag Reservoir & Dam, LLC v. Rhode Island,* 337 F.3d 87, 91 (1st Cir.), *cert. denied,* 540 U.S. 1090 (2003); *Gilbert v. City of Cambridge,* 932 F.2d 51, 63-65 (1st Cir.), *cert. denied*, 502 U.S. 866 (1991).[14] Moreover, as the court of appeals recognized, "res judicata does not apply where a claim could not have been raised in the first litigation." App. 6a-7a (citing, *inter alia,* Restatement (Second) of Judgments § 26(1)(c) (1982)). The outcome below, therefore, should have been simple. If a federal takings claim does not exist at the time of initial state litigation, and claim preclusion does not bar claims that a plaintiff could not raise in the initial state litigation, then claim preclusion cannot bar a federal takings claim raised in a later federal suit.

But the court of appeals avoided this logic through a strained application of claim preclusion. It believed that "the federal takings claim was actually litigated to a final judgment on the merits in state court," because Petitioners' state complaints "identified" the Fifth Amendment and "cited" *First English.* App. 7a (original emphasis). But how could this be? How could Petitioners have litigated federal takings claims in state court if those federal claims

[14] Even though *Pascoag* and *Gilbert* were central to Petitioners' briefing and oral argument, the court of appeals failed to mention either case in the decision below.

did not yet exist? Moreover, ripeness goes to the court's jurisdiction. See *Nat'l Park Hospitality Ass'n v. Dep't of Interior,* 538 U.S. 803, 807 (2003); *Suitum v. Tahoe Reg'l Planning Agency,* 520 U.S. 725, 733 n.7 (1997). A court either has jurisdiction or it doesn't, and parties cannot create jurisdiction by their pleadings. See, *e.g.*, *The Travelers Indem. Co. v. Dingwell*, 884 F.2d 629, 636 (1st Cir. 1989). In other words, contrary to the court of appeals' decision, Petitioners could not have created state court jurisdiction over their federal claims through ancillary references in their state litigating papers to the Takings Clause and *First English.*

Thus, it is important to recognize that the decision below was not merely an application of New Hampshire res judicata principles. To the contrary, this case turns on whether the New Hampshire courts had jurisdiction over federal takings claims when Petitioners brought their state law inverse condemnation action. The answer depends on the meaning of *Williamson*: if the New Hampshire courts did not have jurisdiction over the federal takings claims, then the court of appeals should not have invoked claim preclusion. This Court can provide the definitive answer by squarely addressing the state-litigation rule presented in this petition.

F. Because of the State-Litigation Rule, the Takings Clause is the Only Bill of Rights Provision Barred from Federal Court Review.

Petitioners are the latest in a long line of takings claimants who have been denied access to federal court, due to *Williamson*'s state-litigation rule and application of the preclusion doctrines. *San Remo*'s concurrent litigation rule will further bar federal adjudication of Fifth Amendment claims, because it "ensures that litigants who go to state court to seek compensation will likely be unable later to assert their federal takings claims in federal court ...." *San Remo,* 545 U.S. at 342 (Rehnquist, C.J., concurring.). This is precisely what has transpired. By the late 1990s, the lower federal courts regularly cited the state-

litigation rule to avoid deciding the merits of Fifth Amendment takings claims. See John J. Delaney & Duane J. Desiderio, *Who Will Clean Up the "Ripeness Mess"? A Call for Reform so Takings Plaintiffs Can Enter the Federal Courthouse*, 31 Urb. Law. 195, 203-205 (1999) (surveying all land-use takings cases with a federal court decision from 1990-1998). As a preeminent takings scholar testified before Congress, the lower federal courts have engaged in a "wholesale abdication of federal jurisdiction" over Fifth Amendment claims and have achieved the "undeserved and unwarranted result [of] avoiding the vast majority of takings cases on their merits." Test. of Prof. Daniel Mandelker on H.R. 1534, Before the H. Comm. on the Judiciary, Subcomm. on Courts and Intellectual Property, *reprinted in* 31 Urb. Law. 195, 234 (1999).

With Fifth Amendment claims consigned to state court, whether by virtue of *Williamson's* state-litigation rule or *San Remo*'s authorization of concurrent claims, the result is that citizens can be denied substantive protections of the United States Constitution. State courts like New Hampshire's frequently decline to rely upon or adhere to Fifth Amendment standards to adjudicate property rights claims. See, *e.g. State v. Ball,* 471 A.2d 347, 351-352 (N.H. 1983) ("[T]he right of our citizens to the full protection of the New Hampshire Constitution requires that we consider State constitutional guarantees"; any federal precedent is "merely ... guidance" and "our results [are not] bound by those decisions").

The Bill of Rights furnishes a minimum national standard for individual rights, and the federal Constitution provides a "floor" of protection. See, *e.g., Mills v. Rogers*, 457 U.S. 291 (1982); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980). In takings cases, however, state court adherence to Fifth Amendment standards has ranged from

random to nonexistent.[15] For example, because Petitioners did not and could not raise Fifth Amendment claims in the state courts, the New Hampshire Supreme Court did not consider whether Petitioners deserved compensation under this Court's seminal takings cases, such as *Penn Cent. Transp. Co. v. City of New York,* 438 U.S. 104 (1978) (multi-factor test to determine government takings liability), or *First English.* Indeed, the New Hampshire court reached a decision directly contrary to this Court's jurisprudence.

Similarly, in *Santini v. Conn. Hazardous Waste Mgmt. Serv.,* 739 A.2d 680 (Conn. 1999), *cert. denied,* 530 U.S. 1225 (2000), the Connecticut Supreme Court rejected the property owner's argument that Fifth Amendment precedent established minimum standards for adjudicating a takings claim brought under the Connecticut constitution. The court stated that federal standards were "irrelevant." 739 A.2d at 688, n.20. Another example occurs under Ohio law, where a takings claimant must prove a loss of all economically viable use to a criminal standard of "beyond a reasonable doubt." *Goldberg Cos. Inc. v. Richmond Heights City Council*, 690 N.E.2d 510, 514 (Ohio 1998). Thus, the *Williamson* state-litigation rule has not only denied takings plaintiffs a federal forum, but in some cases denied adjudications that employ federal standards.

Furthermore, in denying Fifth Amendment claimants access to federal courts, *Williamson* and *San Remo* have negated the critical role of the federal judiciary under 42 U.S.C. § 1983, to oversee and correct actions taken by municipalities "under color of state law" that violate federal civil rights. The "central purpose" of section 1983 "is to provide compensatory relief to those deprived of their

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[15] Ronald H. Rosenberg, *The Non-Impact of the United States Supreme Court Regulatory Takings Cases on the State Courts: Does the Supreme Court Really Matter?* 6 Fordham Envtl. L.J. 523 (1995).

federal rights by state actors," *Felder v. Casey*, 487 U.S. 131, 141 (1988), by "interpos[ing] the federal courts between the States and the people, as guardians of the people's federal rights." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972). Congress intended for section 1983 to provide "*immediate* access to the federal courts," and "throw open the doors of the United States courts" for individuals deprived of their constitutional rights. *Patsy v. Fla. Bd. of Regents,* 457 U.S. 496, 504 (1982) (emphasis supplied). But the state-litigation and concurrent claims rules have slammed that federal door shut on takings claimants. And, application of the preclusion doctrines has changed the locks altogether.

G. Thus, *Williamson* Demands Reconsideration.

When this Court decided *Williamson* in 1985, modern takings jurisprudence was still in its infancy. Indeed, not until 1987 in *First English* did this Court decide that monetary compensation was the "self-executing" remedy required by the Takings Clause. 482 U.S. at 315-16. Since then, the contours of the Fifth Amendment's substantive protections have become somewhat more defined. But the most basic, fundamental jurisdictional question—Can a federal court decide a federal takings claim?—is undeciphered.

It is no exaggeration to assert that *all* of takings law, both substantive and procedural, developed by this Court and the lower federal and state courts, hinges on clarification of the *Williamson* state-litigation rule. If this Court truly means to shield Fifth Amendment protections from federal review, respectfully, it needs to say so unequivocally. Whether federal takings claims are reviewable in federal court is a significant constitutional question, and this petition should be granted so the Court can revisit the state-litigation rule.

II. THIS COURT SHOULD RESOLVE THE SPLINTERED CIRCUIT STANDARDS ON LIABILITY FOR DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS.

In addition to the Takings Clause takings question discussed above, the Court should grant this petition to decide important questions under the Due Process Clause, upon which the lower courts are irreconcilably split.

A. This Court's Decisions Regarding Deprivation of Property Without Due Process.

In *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005), this Court decided that the "substantially advance[s] a legitimate government interest" test from *Agins v. City of Tiburon*, 447 U.S. 255 (1980), "has no proper place in our takings jurisprudence," because "this formula prescribes an inquiry in the nature of a due process ... test ...." *Lingle*, 544 U.S. at 540. The Court never explained what the correct formula *is* to determine when government action deprives private property without due process.

Lingle compounds the confusion wrought by *Eastern Enterps. v. Apfel*, 524 U.S. 498 (1998), a 4-1-4 decision. There, a four-Justice plurality decided that legislation requiring a mining company to pay retroactive health benefits to its former employees was unconstitutional. It rendered its decision under a Fifth Amendment takings analysis. However, four dissenting Justices decided that the case should not be resolved on takings grounds but on due process grounds, and ultimately found no due process violation. *Id.* at 568. Justice Kennedy's fifth vote found the statute unconstitutional-not on takings grounds like the plurality did, but on substantive due process grounds. *Id.* at 539-50 (Kennedy, J., concurring in the judgment). In short, this Court itself has been unclear as to the application of the Due Process Clause to property rights claims, and the lower courts need guidance.

B. The Lower Courts are Applying Different and Conflicting Due Process Standards to Deprivations of Property.

Petitioners alleged a due process count in their federal court complaint:

> [T]he denial of permits, to which [Petitioners] were entitled, constitutes a denial of due process. Application of the Ordinance, which was invalid from its inception and was not rationally related to a legitimate government interest, was an arbitrary and capricious action of the Town that denied [Petitioners'] due process.

App. 38a, ¶37. The court of appeals dismissed the due process claim on the merits: "Even where officials have allegedly violated state law or administrative procedures, such violations do not ordinarily rise to the level of a constitutional deprivation." App. 9a (citing *SWF Arecibo Ltd. v. Rodriguez*, 415 F.3d 135, 141 (1st Cir. 2005). But Petitioners never raised a due process claim against *procedures*. The complaint plainly asserts that application of the "invalid, *ab initio*" ordinance was an irrational, arbitrary and capricious government action.

After dismissing Petitioners' due process claim, the court of appeals announced what it believed to be the appropriate test: "Substantive due process prevents governmental power from [1] being used for purposes of oppression, *or* [2] abuse of government power that shocks the conscience, *or* [3] action that is legally irrational in that it is not keyed to any legitimate state interest." App. 9a-10a (emphasis and brackets supplied). Petitioners pleaded their due process claim squarely within the First Circuit's third category. Thus, the allegations should have been accepted as true on a motion to dismiss. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 475 (1999). The overriding question, however, is which, if any, of the First Circuit's three categories supplies the correct test for a substantive due process claim for deprivation of property rights.

Lingle stated that the "substantially advance a legitimate government interest" formula "prescribes an inquiry in the nature of ... due process." *Lingle,* 544 U.S. at 540. So, has the "substantially advances" test been switched, from takings to due process? The court implied as much: "The 'substantially advances' formula suggests a means-end test .... An inquiry of this nature has some logic in the context of a due process challenge, for a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause." *Id.* at 542. That dictum, however, will not resolve the conflicts on this issue among the courts of appeals.

1. "Rational Relationship." Some circuits use a traditional "rational relationship" test for claims alleging deprivations of due process in property. See, *e.g., S. Blasting Servs., Inc. v. Wilkes County*, 288 F.3d 584, 594 (4th Cir. 2002) (in regulating an explosives business, "the County's actions were rationally related to a legitimate government purpose"); *Greater Chicago Combine and Ctr., Inc. v. City of Chicago*, 431 F.3d 1065, 1071-72 (7th Cir. 2005) (to succeed on a substantive due process claim, the challenged ordinance must have "no substantial relation to the public health, safety, morals or general welfare") (internal quotes omitted); *Iowa Coal Mining Co., Inc. v. Monroe County*, 257 F.3d 846, 853 (8th Cir. 2001) (county did not act "truly irrational" or violate substantive due process when it enacted an ordinance to prevent mining lessee from landfilling empty mines); *Spoklie v. Montana*, 411 F.3d 1051, 1059 (9th Cir. 2005) (statute is not invalid under substantive due process unless it has "'no substantial relation to the public health, safety, morals or general welfare'") (quoting *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926)); *Crider v. Bd. of County Comm'rs of the County of Boulder*, 246 F.3d 1285, 1289 (10th Cir. 2001) (substantive due process violated if government actions have "no conceivable rational relationship to the exercise of the state's traditional police power through zoning") (internal quotations omitted).

2. "Shocks The Conscience." Like the court of appeals below, several circuits supplement the traditional "rational relationship" test with a "shocks the conscience" standard.[16] These decisions do not explain when "shocks the conscience" is the more appropriate formulation to trump "rational relationship" in any case. See, *e.g., Conroe Creosoting Co. v. Montgomery County,* 249 F.3d 337, 341 (5th Cir. 2001) (when a property owner claimed the county violated his right to substantive due process, court asked whether the government action was so egregious as to shock the conscience); *Koscielski v. City of Minneapolis*, 435 F.3d 898, 902-03 (8th Cir. 2006) (no substantive due process violation occurred because an ordinance restricting usage of property as a firearm dealership was not "so irrational and egregious as to shock the conscience"); *Santana v. City of Tulsa*, 359 F.3d 1241, 1244 (10th Cir. 2004) (applying a shocks the conscience test to hold that the city did not violate substantive due process rights when it removed discarded items from plaintiff's property under a local nuisance law).

3. Hybrid Approach. The Third Circuit recently considered a substantive due process claim in a dispute concerning approval for a sand and gravel extraction business. It held that the correct due process standard depends on which government branch takes action. If the claimant challenges *executive* action (like the application of an ordinance to a specific piece of property), then "shocks the conscience" controls. However, *legislative* action (such as a facial challenge to an ordinance itself) "will withstand substantive due process challenge if the government 'identifies the legitimate state interest that the legislature

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[16] This Court has never applied a "shocks the conscience" standard in a property rights case. It has used that standard to test a due process claim challenging local law enforcement in an emergency situation. *County of Sacramento v. Lewis,* 523 U.S. 833, 847 (1998) (police vehicular pursuit case).

could rationally conclude was served by the statute.'" *County Concrete Corp. v. Twp. of Roxbury,* 442 F.3d 159, 169 (3d Cir. 2006) (quoting *Nicholas v. Penn. State Univ.*, 227 F.3d 133, 139 (3d Cir. 2000)).[17]

4. "Arbitrary and Capricious." The Sixth Circuit, in a pre-*Lingle* case, said that "arbitrary and capricious" and "shocks the conscience" mean the same thing. *Bowers v. City of Flint*, 325 F.3d 758, 763 (6th Cir. 2003). But post-*Lingle,* the Sixth Circuit "recognized that a substantive due process violation occurs when arbitrary and capricious government action deprives an individual of a constitutionally protected property interest"—without discussing the relationship between "arbitrary and capricious" and "shocks the conscience." *Warren v. City of Athens*, 411 F.3d 697, 707 (6th Cir. 2005). On the other hand, the Second Circuit believes "arbitrary" is synonymous with "irrational." *Harlen Assocs. v. Inc. Vill. of Mineola*, 273 F.3d 494, 503 (2d Cir. 2001) (due process plaintiff must show "that the defendants infringed [on a property interest] in an arbitrary or irrational manner").

In summary, there is no uniform, national standard for how lower federal courts treat Fifth and Fourteenth Amendment due process claims where the core facts concern deprivation of private property. The petition should be granted to resolve this evident conflict within and among the circuit courts of appeals.

III. CONCLUSION.

Whether the federal courts can and must decide the merits of claims brought under a Bill of Rights provision is an issue of extraordinary constitutional importance.

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[17] As if that distinction was easy to discern. See *Clinton v. City of New York,* 524 U.S. 417, 481 (1998) ("'The Court does not 'carry out the distinction between legislative and executive action with mathematical precision' or 'divide the branches into watertight compartments'").

In *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994), this Court announced: "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or the Fourth, should be relegated to the status of a poor relation." If federal courts are not available to decide Fifth Amendment claims, then the Takings Clause is not just a "poor relation" to other constitutional guarantees. It has been disowned altogether.

Personal freedom finds tangible expression in the ownership of property. Individual rights should not vary based on the particular standards of government liability employed in a given circuit. The Court's review is also warranted to resolve the wide split on the proper due process test when property rights are at stake.

For all of the foregoing reason, the petition for a writ of certiorari should be granted.

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Respectfully submitted,

Timothy S. Hollister
(Counsel of Record)
Allison M. McKeen
Shipman & Goodwin LLP
One Constitution Plaza
Hartford, CT 06103-1919
(860) 251-5000

Sumner F. Kalman
Thea Valvanis
147 Main Street
P. O. Box 988
Plaistow, NH 03865
(603) 382-4003

Duane J. Desiderio
Thomas J. Ward
Felicia Watson
National Association of
Home Builders
1201 15th Street, NW
Washington, DC 20005
(202) 266-8200